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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

To the Commission:

JOINT REPLY COMMENTS OF E.SPIRE COMMUNICATIONS, INC. AND KMC TELECOM, INC.

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SUMMARY

At first glance, the record in this proceeding seems to demonstrate that mandatory bill-and-keep is a solution in search of a problem. Comment after comment explains that mandatory bill-and-keep would not achieve the goals that the Commission identifies in the NPRM. Upon further scrutiny of the record, however, it becomes clear that mandatory bill-and-keep is so inherently flawed that it could not be a solution for any problem. Rather than solve any problems with the existing CPNP system, mandatory bill-and-keep would actually exacerbate existing problems and create new ones.

Mandatory bill-and-keep would create uncertainty rather than the regulatory certainty that is crucial to so many carriers under current market conditions. Instead of eliminating regulatory arbitrage, it would create new types of regulatory arbitrage. Mandatory bill-and-keep would force carriers to make inefficient investments and harm competition rather than encourage efficient network expansion and foster competition. The flaws inherent in mandatory bill-and-keep would be exacerbated if applied only to ISP-bound traffic or phased-in incrementally. In addition to being a bad idea, mandatory bill and keep is illegal under the 1996 Act for any type of traffic.

In sharp contrast to mandatory bill-and-keep, cost-based rates promote efficient competitive entry and competition, which in turn expands consumer choice, spurs innovation, and moves end user prices toward cost. Intercarrier compensation regimes that allow carriers voluntarily to agree to bill-and-keep, or that require bill-and-keep where the traffic flow between competing carriers is roughly equal, are consistent with this principle. However, the imposition of mandatory bill-and-keep where the traffic flow between competing carriers is not roughly in balance sets the intercarrier compensation rate at zero, which is not cost-based or consistent with

the 1996 Act. Accordingly, the Commission should reject mandatory bill-and-keep where the traffic flow between competing carriers is not roughly balanced.

The record also demonstrates that carriers are entitled, and should continue to be entitled, to use virtual NXX codes to provide valuable telecommunications services to end users, including businesses that rely on the use of telephone numbers from virtual NXX codes to compete effectively. Traffic is routed to telephone numbers from virtual NXX codes in exactly the same way that traffic is routed to telephone numbers from any other NXX. Accordingly, carriers incur the same costs to terminate traffic routed to a number from a virtual NXX code as they do for numbers from any other NXX code. Therefore, there is no basis for making a distinction between virtual NXX codes and other NXX codes under the 1996 Act or federal numbering rules and policies. KMC and e.spire join the several parties in this proceeding who urge the Commission to reaffirm the right of CLECs to provide FX-type services, including those provided with virtual NXX arrangements.

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To the Commission:

JOINT REPLY COMMENTS

e.spire Communications, Inc. ("e.spire") and KMC Telecom, Inc. ("KMC"), through their attorneys, submit these reply comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.

KMC and e.spire support unified intercarrier compensation regimes that allow carriers voluntarily to agree to bill-and-keep, or that require bill-and-keep where the traffic flow between competing carriers is roughly in balance. However, KMC and e.spire join the parties to this proceeding who strongly oppose mandatory bill-and-keep where the traffic flow between competing carriers is not roughly in balance. **As** the record demonstrates, TELRIC-based intercarrier compensation rates promote efficient competitive entry and competition, which in turn expand consumer choice, spur innovation, and move end user prices toward cost.[1] Therefore, e.spire and KMC urge the Commission to adopt a unified intercarrier compensation

[1] *E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 679, 705 (1996) *("Local Competition Order"), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068 (8th Cir. 1997) *("CompTel"), aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997) *("Iowa Utils. Bd."), aff'd in part and reversed in part sub nom. AT&T v. Iowa Utils. Bd.,* 119 S. Ct. 721 (1999).

regime that relies on TELRIC-based rates rather than mandatory bill-and-keep where the traffic flow between competing carriers is not roughly balanced.

The record also demonstrates that carriers are entitled to use virtual NXX codes to provide valuable telecommunications services to end users, including businesses that rely on the use of telephone numbers from virtual NXX codes to compete effectively. Traffic is routed to telephone numbers from virtual NXX codes in exactly the same way that traffic is routed to telephone numbers from any other NXX. Accordingly, carriers incur the same costs to terminate traffic routed to a number from a virtual NXX code as they do for numbers from any other NXX code. Therefore, there is no basis for making a distinction between virtual NXX codes and other NXX codes under the 1996 Act or federal numbering rules and policies. KMC and e.spire join the many parties in this proceeding who urge the Commission to reaffirm the right of CLECs to provide FX-type services, including those provided with a virtual NXX arrangement.

I. THE COMMISSION SHOULD NOT IMPOSE MANDATORY BILL-AND-KEEP FOR ANY TYPE OF TRAFFIC

Nearly every commenting party, except for the ILECs, urged the Commission not to impose a mandatory bill-and-keep intercarrier compensation regime.[2] The reasons for

[2] *See, e.g.,* Comments of Ad Hoc Telecommunications Users Committee at 3-4 ("Ad Hoc Comments"); Comments of Allegiance Telecom, Inc. at 7 ("Allegiance Comments"); Comments of AT&T Corp. at 21, 26-33 ("AT&T Comments"); Comments of Alltel Communications Inc. at 3 ("Alltel Comments"); Comments of Competitive Telecommunications Association at 6-7 ("CompTel Comments."); Comments of Home Telephone Company, Inc. at 1 ("Home Comments"); Comments of Michigan Exchange Carriers Association at 10 ("MECA Comments"); Comments of Minnesota Independent Coalition at 1-5 ("MIC Comments"); Comments of National Exchange Carrier Association, lnc. at 2-3 ("NECA Comments"); Comments of National Telephone Cooperative Association at 7-9 ("NTCA Comments"); Comments of Public Service Commission of Missouri at 2-3 (PSCM Comments); Comments of Focal *et a/.* at 25-42; Comments of the Maryland Office of People's Counsel at 2-46 ("MOPC Comments"); Comments of the Texas Office of Public Utility Counsel at 12-48 ("OPUCT Comments"); Comments of Time Warner Telecom at 4-29 ("TWTC Comments")

rejecting mandatory bill-and-keep are numerous. Not only is mandatory bill-and-keep illegal under the Telecommunications Act of 1996,[3] it is unnecessary because market forces are driving reciprocal compensation rates for all types of traffic – including ISP-bound traffic – to cost, and these rates will continue to fall absent regulatory intervention.[4] Moreover, the implementation of COBAK, BASICS, or any other mandatory bill-and-keep regime would create substantial new problems and impose significant new costs.[5] Commission intervention at this stage to set rates artificially to zero will create a host of new problems without achieving the Commission's goals.

KMC and e.spire agree with those who urge the Commission to adopt a unified intercarrier compensation regime that relies on TELRIC-based rates rather than mandatory bill-and-keep.[6] TELRIC-based rates promote efficient competitive entry and competition, which in turn expand consumer choice, spur innovation, and move end user prices toward cost, as the Commission determined when it implemented the **1996** Act.[7] In sharp contrast to mandatory bill-and-keep, which creates incentives for carriers to configure their networks to shift costs to their competitors, TELRIC-based rates do not lead to market distortions.[8] As the Office of Public Utility Counsel of Texas ("OPUCT") explains in its comments, the ILECs should be

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However, carriers may agree voluntarily to bill-and-keep provisions (or variations thereof) in negotiated agreements. *See also* Allegiance Comments at 35; Time Warner Telecom at 27-30.

4 TWTC Comments at **3**

5 *Id.* at 2.

6 CompTel Comments at 20; Comments of Focal *et al.*, PacWest, RCN, US LEC at **4.**

7 *E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report **and** Order, 11 FCC Rcd 15499, ¶¶ *679, 705* (1*996)* (*"Local Competition Order"), a f d in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC,* 1 17 F.3d **1068** (8th Cir. 1997) (*"CompTel"*), *a f d in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997) (*"Iowa Utils. Bd."*). *aff'd in part and reversed in part sub nom. AT&T v. Iowa Utils. Bd.,* 119 S. Ct. 721 (1999).

8 CompTel Comments at 20; MD OPC Comments at 21.

indifferent to paying CLECs $2 billion in reciprocal compensation if rates were TELRIC-based, because they would be avoiding $2 billion in termination costs.[9] Accordingly, the Commission should focus on ensuring that termination rates are cost-based rather than exploring drastic regulatory measures like the mandatory bill-and-keep schemes discussed in the NPRM, both of which are based on false assumptions about call benefits and costs.[10]

A. THE IMPOSITION OF MANDATORY BILL-AND-KEEP WOULD CREATE REGULATORY UNCERTAINTY

Regulatory certainty must be a top priority for the Commission, particularly under current market conditions, as numerous commenters recognized.[11] The effects of uncertainty on the telecommunications industry can be devastating, making it difficult or impossible for carriers to obtain additional funding they need to expand their networks and create the facilities-based competition that the Commission seeks to foster, or even to maintain current operations.[12]

The Commission would create regulatory uncertainty by imposing mandatory bill-and-keep because the implementation process will require the Commission to resolve politically difficult issues and oversee the complete reversal of the CPNP system.[13] As many commenters noted, the two mandatory bill-and-keep proposals discussed in the NPRM are far too abstract for quick implementation.[14] The **BASICS** proposal in particular would be extremely

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9 OPUCT Comments at 31.

10 Allegiance Comments at 18-21; CompTel Comments at 9-15; TWTC Comments at 3, 5-8.

11 Ad Hoc Comments at 6; Allegiance Comments at 6-10; MPOC Comments at 2-7; OPUCT Comments at 30.

12 Allegiance Comments at 5.

13 *id.* at 23-25; Comments of Focal *et al* at 6; MOPC Comments at 33-36; TWTC Comments at 12-13.

14 NECA Comments at 14.

difficult to implement due to the need to separate out interconnection costs.[15] If the Commission decided against reason to impose mandatory bill and keep for any type of traffic, it would have to initiate an extensive implementation proceeding to address the many complex issues that the bill-and-keep proposals fail to address, including the regulatory protections that would be necessary to prevent ILECs from shifting costs to CLECs.[16]

In these implementation proceedings, the Commission would have to create new regulatory distinctions (*e.g.*, the definition of central office or local access) in order to determine which interconnecting carrier must bear the costs of transport and access, and thus which carrier must recover these costs from its end users. Implementation of these new regulatory distinctions, which have no real meaning in the context of the network, would be administratively burdensome, complex, and expensive. The Commission would also have to adopt a new class of federal end user charges to replace the existing access charge system,[17] which would be neither quick nor easy as the Commission's experiences with the PICC and universal service end user charges demonstrate.[18] Given the sheer volume and controversial nature of issues that the Commission would have to address in a proceeding to implement mandatory bill-and-keep, the process is certain to be lengthy and vigorously contested at every stage of the proceeding. The resulting uncertainty would make it difficult, if not impossible, for carriers to obtain financing, which will harm competition.

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15 TWTC Comments at 3, 17.

16 Comments of Focal *et al* at 11; TWTC Comments at 13.

17 Allegiance Comments at 24; Comments of Focal *et al* at 6-10.

18 OPUCT Comments at 51-52; NASUCA Comments at 35.

B. MANDATORY BILL-AND-KEEP WOULD SHIFT RATHER THAN ELIMINATE OPPORTUNITIES FOR REGULATORY ARBITRAGE

As KMC noted in its comments, mandatory bill-and-keep offers no advantage whatsoever over cost-based intercarrier compensation rates when it comes to eliminating "regulatory arbitrage."" It is true that mandatory bill-and-keep would eliminate certain types of regulatory arbitrage. However, new types of regulatory arbitrage would arise as carriers adjust their business plans to account for new regulatory distinctions and the immediate replacement of one cause of market distortions – above cost termination rates – with another – below cost termination rates.[20]

KMC and e.spire agree with AT&T that rates which stray significantly from cost-based levels lead to regulatory arbitrage, not any inherent characteristics of the current CPNP regime." Although above-cost rates under the current system create incentives for carriers to seek out customers who terminate more traffic than they originate, below-cost rates under mandatory bill-and-keep would create incentives for ILECs to reconfigure their networks in order to maximize the costs that their competitors incur to terminate ILEC-originated calls while minimizing the costs that ILECs incur to terminate calls originated by other carriers.[22] Worse yet, unlike the current CPNP regime where market forces are reducing market distortions over time by driving above-cost termination rates to cost-based levels, mandatory bill-and-keep would

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19 KMC Comments at 4.

20 Ad Hoc Comments at 2-3; Alltel Comments at 4; AT&T Comments at 30-31; Global Naps Comments at 9-10; Minnesota Independent Coalition Comments at 8-9; TWTC Comments at 9-12.

21 AT&T Comments at 13-17.

22 Allegiance Comments at 16; KMC Comments at 4; PCIA Comments at 11; TWTC Comments at 9-12.

prevent market forces from correcting market distortions over time because termination rates are locked at below-cost levels.[23] Therefore, it is not surprising that many commenters, including Verizon, believe that the opportunities for regulatory arbitrage would be even greater with mandatory bill-and-keep.[24]

C. MANDATORY BILL-AND-KEEP WOULD INHIBIT COMPETITION BY DISCRIMINATING AGAINST CLECS AND REQUIRING INEFFICIENT NETWORK INVESTMENT

Several commenters agree that imposition of mandatory bill-and-keep would discriminate against CLECs by needlessly forcing them to duplicate the network configuration of the ILECs.[25] For example, CLECs would have to establish multiple points of interconnection per **LATA** and radically different interconnection arrangements under the mandatory bill-and-keep schemes that the Commission discussed in the NPRM.[26] ILECs would not bear this burden because their networks are ubiquitous. Thus, the transition from CPNP to mandatory bill-and-keep would impose significant costs on CLECs that ILECs would not face.[27]

It also will be much more difficult for CLECs to recover costs from their end users. because CLECs have a much smaller customer base over which to spread termination costs than ILECs, which have over 95 percent of the local exchange market.[28] The ILECs would also have substantial flexibility to structure the end user rate increases required by mandatory

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23 *See* Allegiance Comments at 10-13; AT&T Comments at 13-17.

24 CompTel Comments at 7: OPUCT Comments at 37-43; Verizon Comments at 2 **("As** large as the Internet-bound problem was . . . replacing access and local compensation generally with bill-and-keep could result in even greater opportunities for uneconomic activity.").

25 Allegiance Comments at **3-4,** 18.22; AT&T Comments at 12; MOPC Comments at **14-15;** OPUCT at 45-47.

26 Allegiance Comments at 8-9; Comments of Focal *et al* at 17-19.

27 Allegiance Comments at **8-9.**

28 *Id.* **at 16-**17; Comments of Focal *et al* at 12-16.

bill-and-keep because many state commissions have established incentive or price-cap-type regulation plans for ILEC local rates. Lacking the diverse customer base of the ILECs, the CLECs might be unable to match the ILECs' rates. Under these conditions, competition is unlikely to develop. For this reason alone, the Commission should reject mandatory bill-and-keep.

By imposing significant costs only on CLECs, mandatory bill-and-keep would also delay or eliminate CLEC deployment of new technologies in rural areas, as AOL, Cablevision Lightpath, and others noted in their comments.[29] Without competitive pressure from CLECs to deploy new technologies in rural areas, the ILECs themselves may not do so, as the history of ISDN and other technology has proven.

Mandatory bill-and-keep would also unintentionally blunt the competitive forces that have prevented carriers with market power from exercising that power anti-competitively under the current CPNP regime. Specifically, if bill-and-keep is mandated, there will be no incentive for the ILECs to use the networks of the CLECs in an efficient manner, or to structure their own networks in a way that will allow the CLECs to lower their costs. Rather, mandatory bill-and-keep would create incentives for ILECs to reconfigure their networks in order to maximize the costs that other carriers incur to terminate ILEC-originated calls while minimizing the costs that the ILECs incur to terminate calls originated by the other carriers.[30] Moreover, by removing the pressure that the CPNP regime puts on ILECs to reduce above-cost pricing of

[29] AOL Comments at 2; Cablevision Lightpath Comments at 4-5.

[30] CompTel Comments at 8-9; TWTC Comments at 12-17 (explaining ILEC incentives to deny, degrade and delay interconnection arrangements as a means of protecting their market power and the impact of these incentives on bill-and-keep).

UNEs,[31] mandatory bill-and-keep would actually create incentives for ILECs to seek approval to raise UNE rates.[32] Without cost-based UNEs rates, competition in all areas, whether rural or urban, would suffer.[33] Therefore, the Commission should reject bill-and-keep, and retain its current requirements of symmetrical transport and termination rates.[34]

D. MANDATORY BILL-AND-KEEP WOULD IMMEDIATELY AND IRREVERSIBLY HARM CONSUMERS

Many parties agree that mandatory bill-and-keep would harm consumers.[35] As explained above, mandatory bill-and-keep would harm competition, which would lead to increased rates and fewer choices for consumers. However, mandatory bill-and-keep would also harm consumers by forcing carriers to raise their local rates significantly to recover their costs and the losses they would incur as a result of below-cost termination rates.[36] Not only would the large ILECs have to raise their rates significantly,[37] but the rural and independent ILECs would also have to do so.[38] Consumers would have no way to avoid these basic local rate increases without discontinuing service altogether.[39]

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31 Allegiance Comments at 13-16; AT&T Comments at 32.

32 CA Comments at 5.

33 OPUCT Comments at 42.

34 Allegiance Comments at 13-16; TWTC Comments at 30-32.

35 AT&T Comments at 33; MPOC Comments at 23-24; TWTC Comments at 3 (explaining that it is not clear how bill-and-keep will affect retail prices).

36 BellSouth Comments at 15; Qwest Comments at 33; NARUC Comments at 3; NECA Comments at 7-11; SBC Comments at 9-10, 31-32; TWTC Comments at 25-27.

37 BellSouth Comments at 15; Qwest Comments at 33; SBC Comments at 9-10, 31-32.

38 Comments of Focal *et al* at 10-11; Minnesota Independent Coalition Comments at 3; NECA Comments at 5; OPASTCO Comments at 11-12, 17-18; Regulatory Commission of Alaska Comments at 1-8; Ronan Telephone Comments at 2-5; Comments of the Western Alliance at 1-2, 8-24.

39 CompTel Comments at 12-13.

Significant increases in the retail rates charged by all types of LECs would also place a tremendous strain on the universal service fund. This strain would require the Commission and state PUCs to increase universal service fees, as many commenters, including USTA[40] and the state PUCs,[41] recognized in their comments.[42] The end result would be a double whammy for consumers who do not qualify for universal service benefits: significantly higher basic local rates AND greatly increased universal service fees.

E. THE 1996 ACT PROHIBITS MANDATORY BILL-AND-KEEP WHERE TRAFFIC FLOWS BETWEEN COMPETING CARRIERS ARE NOT ROUGHLY BALANCED

Several commenters observed that the imposition of mandatory bill-and-keep where the traffic flows between competing LECs are not balanced is also illegal.[43] The Commission has repeatedly "acknowledge(d) that, no matter what the payment arrangement, LECs incur a cost when delivering traffic . . . that originates on another LEC's network."[44] The 1996 Act establishes a presumption that costs imposed as a result of the exchange of traffic between competing LECs must be recovered. Section 251(b)(5) provides that "[e]ach telecommunications carrier has the duty . . . to establish reciprocal ***compensation*** arrangements for the transport and termination of telecommunications."[45] Section 252(d)(2) provides that the

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40 USTA Comments at 23-24.

41 FL PSC Comments at 3-4; OPUCT Comments at 17-20; **WI** PSC Comments at 5.

42 Alltel Comments at 11-13; TWTC Comments at 25.

43 Allegiance Comments at 5, 35-38; CompTel Comments at 22; Comments of Focal ***et al*** at 28-33; Global Naps Comments at 16; Minnesota Independent Coalition Comments at **6;** MOPC Comments at 37; OPUCT Comments at 47-48; TWTC Comments at 27-29 (explaining that bill-and-keep raises serious legal issues). However, carriers may agree voluntarily to bill-and-keep provisions (or variations thereof) in negotiated agreements.

44 *ISP Intercarrier Conpensation NPRM*, ¶ 29.

45 47 U.S.C. § 251(b)(5) (emphasis added).

reciprocal compensation arrangement must (1) provide for the "mutual and reciprocal" recovery of costs by each carrier; (2) determine these costs on the basis of a "reasonable approximation of the additional costs" of terminating traffic; and (3) does not preclude bill and keep arrangements.[46]

Mandatory bill-and-keep regimes do not meet the "compensation" requirement of Section 251(b)(5) or the "reasonable approximation of the additional costs" requirement of Section 252(d)(2) because they result in a reciprocal compensation rate of zero for surplus traffic where traffic flows between carriers are not roughly equal. For the same reasons, mandatory bill-and-keep regimes violate Section 201(b) of the Act, which requires that "all charges, practices, classifications and regulations" be "just and reasonable."[47] An intercarrier compensation rate of "0" is not just and reasonable. These problems are compounded by the Commission's lack of authority to forbear from enforcing the requirements of Sections 251(b)(5) and 252(d)(2).[48]

Finally, KMC and e.spire agree with those parties who note that mandatory bill-and-keep would violate the Act by infringing on state jurisdiction to establish rates under Section 252(e)(2).[49] Therefore, even if bill-and-keep were not fatally flawed, the Commission would have no authority to set rates at "0" by mandating bill-and-keep.

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46 47 U.S.C. § 252(d)(2).

47 47 U.S.C. § 201(b).

48 TWTC Comments at 28-29.

49 Allegiance Comments at 38; FL PSC at 4-5; Missouri PSC Comments at 3; NTCA Comments at 3.

II. THE COMMISSION SHOULD NOT SINGLE OUT SPECIFIC TYPES OF TRAFFIC FOR MANDATORY BILL AND KEEP

In addition to being illegal under the Act, mandatory bill-and-keep is a bad idea for any type of traffic, including ISP-bound and IP telephony traffic,[50] as the majority of parties explained in their comments.[51] However, the flaws inherent in mandatory bill-and-keep would be exacerbated if the Commission imposed it only on certain types of traffic or adopted a phased-in implementation plan. As Time Warner Telecom and others observed, it would be truly counterproductive to apply bill-and-keep to ISP-bound traffic only or to exclude access rates.[52] Specifically, a regulatory scheme where certain types of traffic are subject to mandatory bill-and-keep and others are subject to the existing CPNP regime would send mixed and diametrically opposed signals to the marketplace. **A** carrier would be forced (1) to offer only those services that are subject to mandatory bill-and-keep and optimize its network accordingly; (2) to offer only those services that are subject to CPNP and optimize its network accordingly; or **(3)** to optimize its network for neither bill-and-keep nor CPNP so that it can offer both types of services. The results of these mixed signals would be disastrous because the incentives not to compete for certain types of traffic would be strong, which would create the type of situations (*e.g.*, regulatory arbitrage) that prompted the Commission to initiate this proceeding in the first

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50 In the NPRM, the Commission notes that it adopted bill and keep as an interim measure in the *ISP Intercarrier Compensation Order. See, e.g.,* NPRM at ¶ 3, *citing* Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order,* FCC 01-131 (rel. April 27,2001) ("*ISP Intercarrier Conzpensation Order").* KMC and e.spire strongly oppose the *ISP Intercarrier Compensation Order,* and are among the parties that have filed petitions for review of that order in the **U.S.** Court of Appeals for the D.C. Circuit. KMC and e.spire urge the Commission not to assume that it will be upheld on appeal. *See also* Allegiance Comments at 40-43; CAPUC Comments at 2; Focal *et al.* Comments at 15; MOPC Comments at 18-20.

51 *See, e.g.*, AT&T Comments at 43-45.

52 AOL Comments at 2-4; Comments of Focal *et al* at 19-25; TWTC Comments at **3,** 19-22.

place.[53] Further, as AT&T explains, the phased-in implementation of mandatory bill-and-keep discussed in the NPRM is like "reverse triage" because it first imposes "reform" where it is least needed.[54]

KMC and e.spire also agree with those parties who urge the Commission not to single out ISP-bound or IP telephony traffic for mandatory bill-and-keep, because doing so sends a signal to investors that the Commission will protect ILECs from competition.'' By imposing mandatory bill-and-keep solely on ISP-bound traffic, the Commission has endowed the ILECs with the best of all possible worlds by permitting them to pay below-cost rates to CLECs for terminating ISP-bound traffic while entitling them to receive above-cost payments from CLECs for terminating all other types of traffic." Therefore, KMC and e.spire agree with numerous commenters that if the Commission does impose mandatory bill and keep, it should do so for all types of traffic simultaneously rather than on a piecemeal basis by singling out certain traffic streams for disparate treatment.[57]

III. THE COMMISSION SHOULD RETAIN THE CURRENT POI AND TRANSPORT RULES

KMC and e.spire agree with those commenters who urge the Commission not to depart from its existing rules that address an ILEC's obligation to deliver its originating traffic to

53 Allegiance Comments at 43-44.

54 AT&T Comments at 2, 6.

55 Allegiance Comments at 2, 5, 39-44; Focal *et al.* Comments at 12-16, 19-25.

56 Focal *et al.* Comments at 22.

57 Alltel Comments at 6; AT&T Wireless Comments at 48; Cbeyond Comments at 7; Global Naps Comments at 9-10.

the POI selected by the CLEC.[58] The Act grants CLECs, not ILECs, the right to select the POI for the exchange of traffic.[59] In fact, the Commission lacks the authority to impose a reciprocal duty on CLECs with respect to interconnection obligations unless: (1) CLECs "occupy a position in the market for telephone exchange service within an area that is comparable to the position occupied" by the ILEC; (2) CLECs have "substantially replaced" ILECs; and **(3)** imposing a reciprocal obligation on CLECs is consistent with the public interest and the purposes of Section 251.[60] The Commission has not, and indeed could not, find that these conditions have been met.

In any event, overhaul of the POI rule is not necessary because, as Allegiance notes, disputes over the establishment of additional POIs in a LATA are being addressed adequately through carrier to carrier negotiations and, where necessary, state arbitration proceedings.[61] Therefore, KMC and e.spire urge the Commission not to usurp the discretion of the network planners from ILECs and CLECs to establish POIs consistent with sound engineering principles.

KMC and e.spire also agree with Allegiance that the Commission should not alter its rule that each LEC bears the burden of delivering telecommunications traffic originated by its customers to the POI selected by the CLEC and recovering the costs for this transport from its own end users.[62] Under the COBAK transport rule, new entrants would be forced to mirror the

58 Allegiance Comments at 26-29; AOL Comments at 5; AT&T Comments at 55-58; Cablevision LightPath Comments at 2-5; Cbeyond Comments at 8-9; Comments of Focal ***et al*** at 54-56.

59 47 U.S.C. § 251(c)(2)(B).

60 47 U.S.C. § 251(h)(2).

61 Allegiance Comments at 28-29.

62 *Id.* at 29-35; **AOL** Comments at 5.

legacy network.[63] Under both the COBAK and BASICS transport rule, CLECs would be forced to fight constantly for their share of transport costs because the ILECs will not voluntarily "split" the costs with the CLECs as required.[64] Neither result is acceptable. By contrast, the Commission's current rule is competitively neutral and easy to administer, and thus there is no justification for changing the rule now.

IV. THE COMMISSION SHOULD REAFFIRM THAT ALL LECS ARE ENTITLED TO PROVIDE FX-TYPE SERVICES, INCLUDING THOSE PROVIDED WITH VIRTUAL NXX ARRANGEMENTS

In its comments, KMC urged the Commission to clarify that carriers are entitled to use virtual NXX codes to provide valuable telecommunications services to end users, including businesses that rely on the use of telephone numbers from virtual NXX codes to compete effectively.[65] The majority of parties who addressed the issue of virtual NXX codes,

63 Allegiance Comments at 30.

64 *Id.* at **34.**

65 KMC Comments at ***6-7.***

including cable companies,[66] ISPs,[67] IXCs,[68] LECs,[69] State PUCs,[70] and wireless carriers,[71] agreed with KMC that carriers should continue to be entitled to use virtual NXX codes.[72]

Only the ILECs opposed the use of virtual NXX codes, which is ironic since all of the ILECs also assign numbers to end users who are not physically located within the rate center with which the NXX code is associated.[73] For example, Verizon accuses some LECs of "misusing telephone numbers to make toll calls look like direct dial local calls," which Verizon claims is not only "inefficient" and "regulatory arbitrage" but also "theft **of** service" from other carriers.[74] However, Verizon engages in exactly the same practices in order to "make toll calls [to Verizon's FX customers] look like direct dial local calls."[75] Thus, if LECs that use virtual NXX arrangements were misusing telephone numbers and stealing services from their competitors as Verizon alleges, then Verizon would be equally guilty.

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66 Cablevision Comments at 2, 7 (urging the Commission not to limit the ability of CLECs to assign NXX codes in a manner that maximizes the efficiencies of those systems for the benefit of customers).

67 AOL Comments at 6-7(urging Commission not to impede the use of virtual NXXs).

68 AT&T Comments at 61-62 (urging the Commission not to impose any restrictions on the use of virtual NXX codes); Sprint Comments at 35-37 (same).

09 Allegiance Comments at 53-54 (urging the Commission to allow the use of virtual NXX codes and maintain existing reciprocal compensation for virtual NXX traffic); Cbeyond Comments at 12 (same); CompTel at 27-28 (same); Comments of Focal ***et al*** at 56-59;

70 OPUCT Comments at 1 17-19.

71 Allied Personal Communications Industry Association of California Comments at **16-**17 (urging Commission not to prohibit use of virtual NXXs); CTIA Comments at 47-48 (urging Commission not to prohibit use of virtual NXXs by CMRS providers); Verizon Wireless Comments at **30** (same).

72 CompTel Comments at 27-28.

73 BellSouth Comments at 7-8; Michigan Exchange Carriers Association Comments at 45; USTA Comments at 32-33: Verizon Comments at 2- 10.

74 BellSouth Comments at 7-8; Verizon Comments at 4; Verizon Wireless Comments at 31.

75 *Id.*

The ILECs' real goal here is not to improve the efficiency with which their competitors utilize numbering resources, but rather to protect themselves from CLEC incursions into the FX market segment, as well as the ISP and other market segments that depend upon FX services. By raising arguments to block CLEC provision of FX services, the ILECs seek to disrupt competition, impose costs on their competitors, and create regulatory uncertainty. If the Commission banned the use of virtual NXX codes, CLECs would be penalized for their lack of ubiquity while ILECs would be permitted to continue offering their customers a "virtual presence" in a distant rate center. Therefore, the Commission should reject the ILECs' argument and reaffirm that all carriers have the right to provide services using virtual NXX arrangements.

A. THE FX SERVICES THAT CLECS OFFER ARE IDENTICAL TO THE FX SERVICES THAT ILECS OFFER

It is common knowledge that both ILECs and CLECs offer FX-type services, as the comments confirm.[76] Although the ILECs agree that both ILECs and CLECs provide FX-type services, they claim that there are significant differences in the way that ILECs and certain CLECs – namely those who utilize virtual NXX arrangements – provide them.[77] These alleged differences form the basis for the ILECs' argument that the use of virtual NXX arrangements harms the originating carrier and is inefficient.[78] However, the ILECs' argument is baseless because the way in which ILECs and CLECs offer FX-type services is identical for all relevant purposes, even where CLECs utilize virtual NXX arrangements, as e.spire and KMC demonstrate below.

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[76] Allegiance Comments at 54; Cbeyond Comments at 12; Verizon Comments at 6.

[77] See, *e.g.*, Verizon Comments at **7-8.**

[78] *Id.* at 6. Specifically, Verizon claims that it a) loses either the toll or access revenues it would normally collect on these calls; **b)** incurs costs to transport the call to the terminating carrier; and c) must pay reciprocal compensation. *Id.*

1. *THE TRANSPORT BURDENS FOR ILECSAND CLECSARE EXACTLY THE SAME*

As KMC explained in its comments, traffic routed to telephone numbers from virtual NXX codes is identical to traffic routed to any other NXX: (1) the calling party originates a call by dialing a seven- or ten-digit number; (2) the originating carrier delivers the call to the terminating carrier's switch pursuant to the interconnection agreement that governs the relationship between the originating and terminating carrier; (3) the terminating carrier delivers the call to the called party.[79] For all of this traffic, the originating carrier is responsible for delivering the calls to a designated point of interconnection ("POI") with the terminating carrier: The respective locations of the POI and the terminating and originating carriers do not change based on the number that the called party has opted to use, and both carriers use the same switches, transport facilities, routing tables and interconnection points to complete the call.[80] Accordingly, the network configuration of both the originating and terminating carriers, and thus the transport costs that the terminating carrier incurs, does not vary based on whether the number that the called party has opted to use is associated with the rate center within which the party is located.

The majority of parties who filed comments in this proceeding agree with e.spire and KMC that the transport costs which terminating carriers incur do not vary based on whether the number that the called party has opted to use is associated with the rate center within which the party is located.[81] Predictably, the ILECs claim that virtual NXX arrangements impose additional costs on originating carriers. Verizon even characterizes virtual NXX arrangements as

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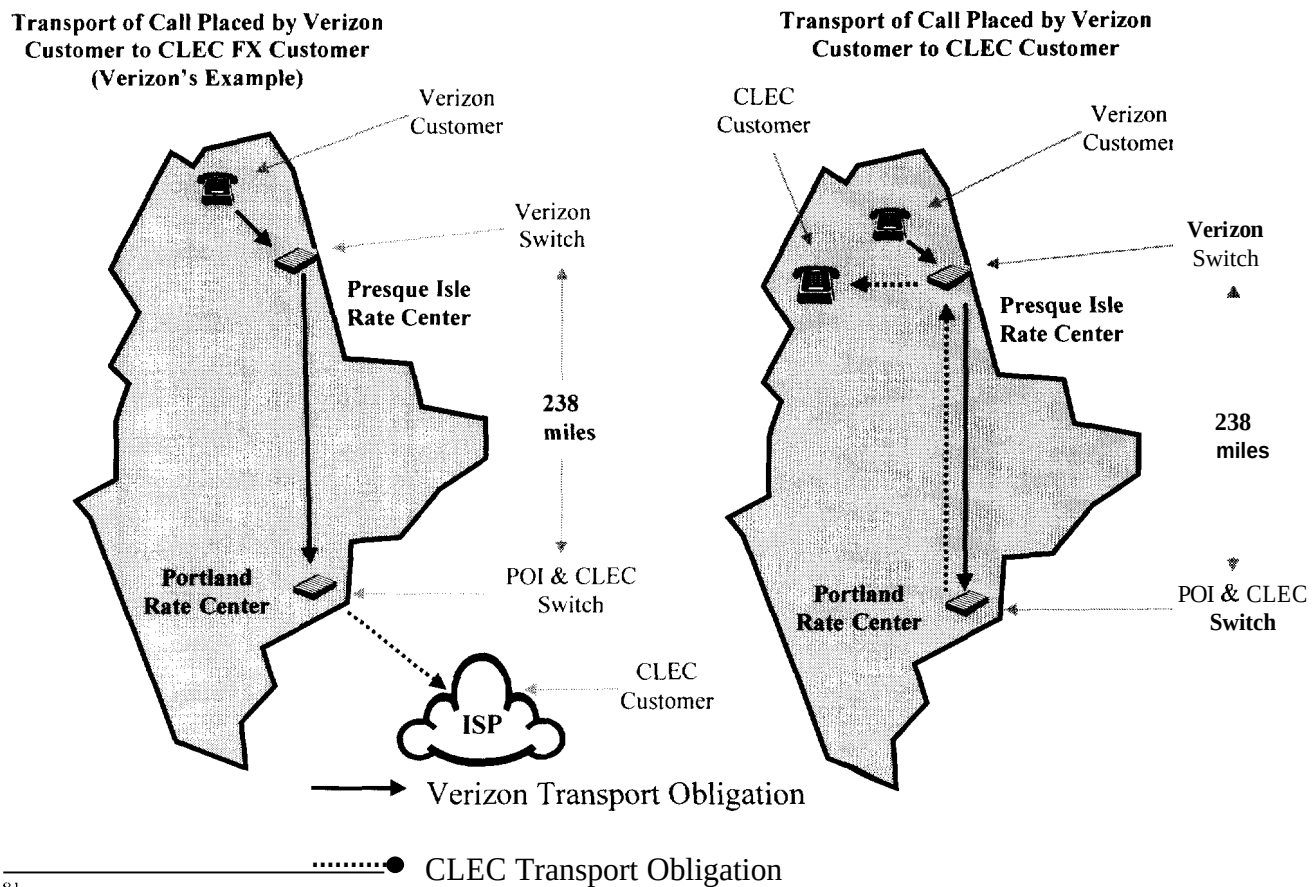
79 KMC Comments at 7-8.

80 *Id.*

a type of "fraud" that amounts to the theft of service because it allegedly imposes additional costs on the originating carrier and requires Verizon to pay the terminating carrier rather than generating revenue in the form of access charges.[82]

In order to illustrate its argument, Verizon attached a diagram entitled "The Maine Game," which purports to show the alleged harm that CLEC FX arrangements inflict on Verizon. However, the misleading nature of Verizon's "Maine Game" diagram becomes immediately apparent when it is compared to a diagram illustrating the transport of a call to a non-FX customer:

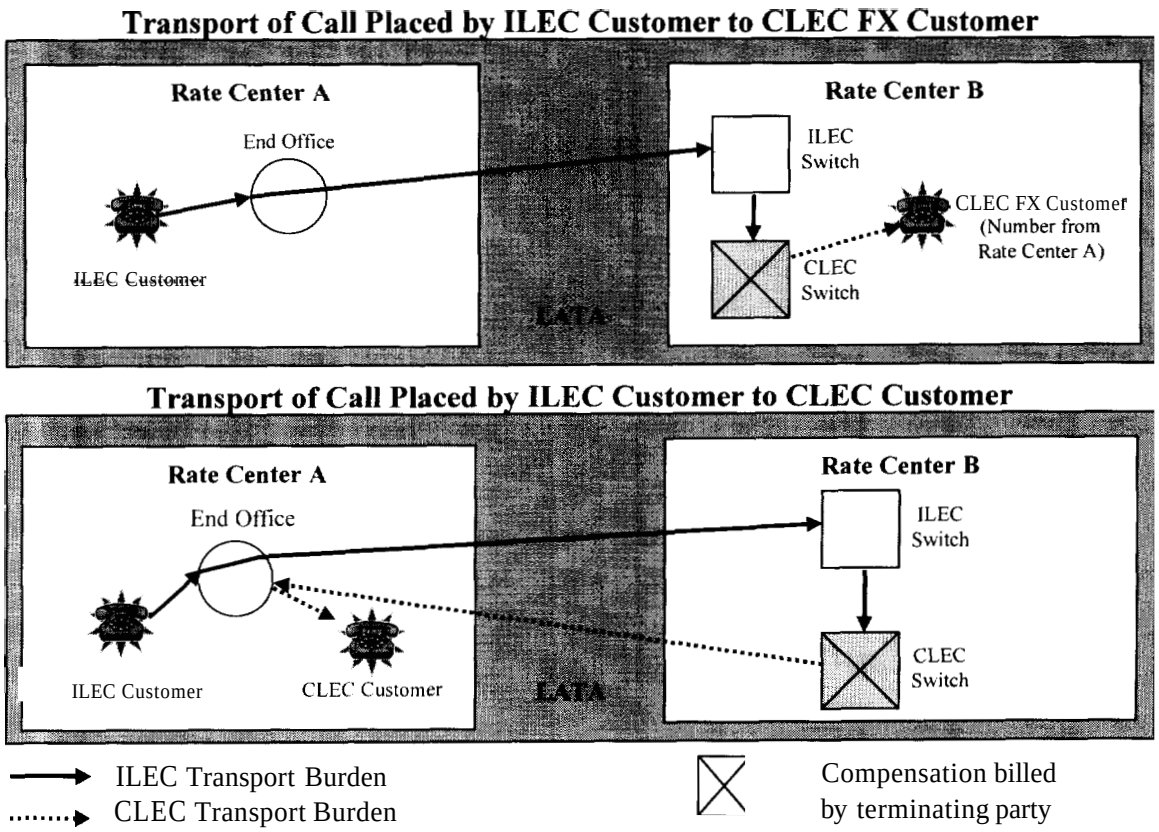
Verizon's So-called "Maine Game"



81 Allegiance Comments at 53.

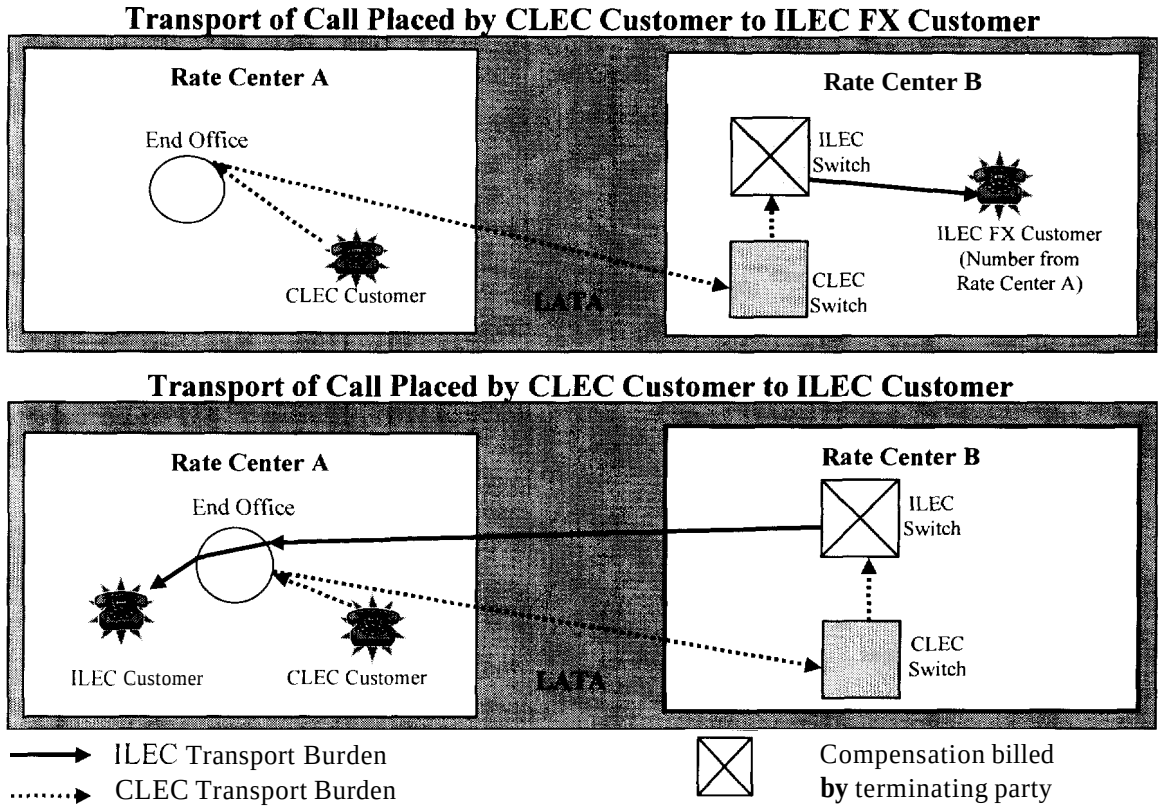
82 MECA Comments at 45.

As the diagrams illustrate, Verizon incurs exactly the same costs to provide originating service to its customers when they call numbers from virtual NXX codes as Verizon incurs when they call numbers from any other NXX code. This is always the case because the distance that a carrier must transport any given call is determined by the location of the carrier's own customer and the location of the POI, not by the service configuration of the interconnecting carrier. The following diagram further illustrates this point by comparing the transport of a call placed by an ILEC customer to a CLEC FX customer with the transport of a call placed by an ILEC customer to a typical CLEC customer:



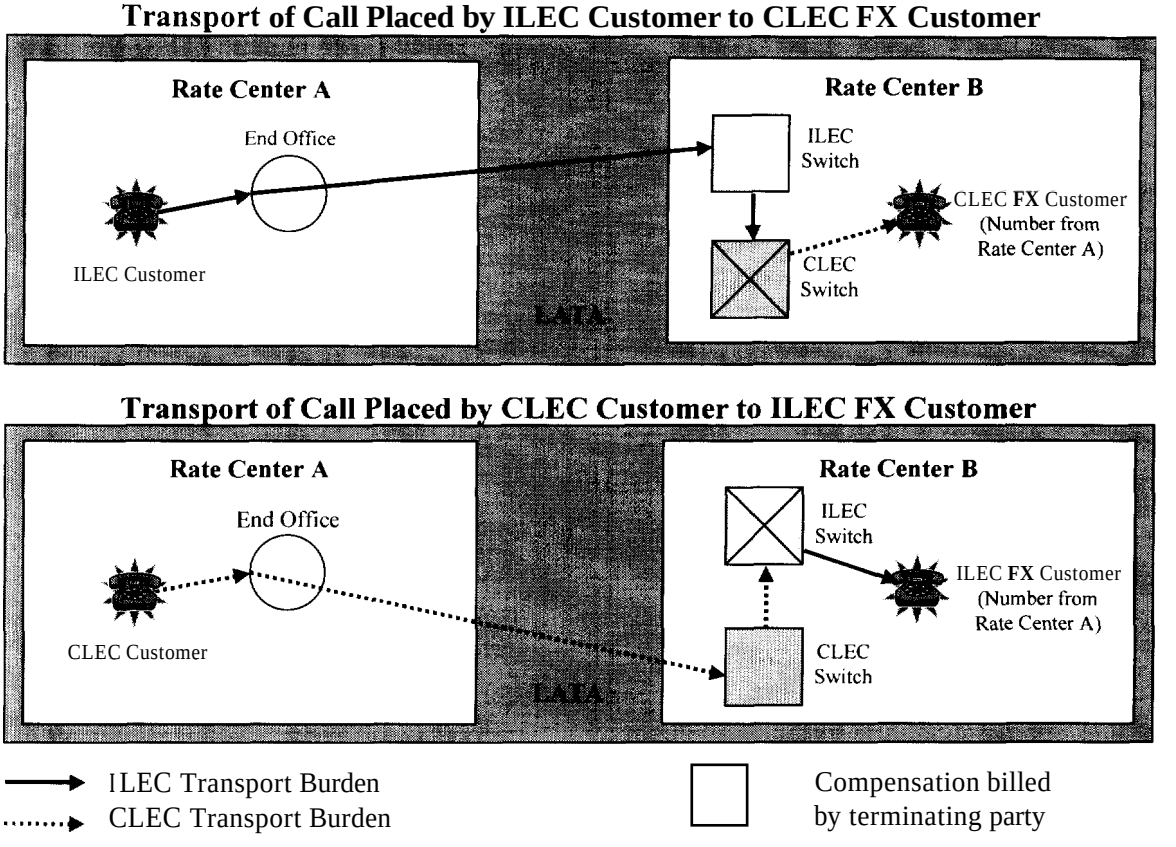
Like the ILECs, a CLEC also incurs the same costs to provide originating service to its customers when they call numbers from virtual NXX codes as the CLEC incurs when they call

numbers from any other NXX code. The following diagram illustrates this point by comparing the transport of a call placed by a CLEC customer to an ILEC FX customer with the transport of a call placed by a CLEC customer to a typical FX customer:



It is also important to note that ILECs and CLECs face the same transport burdens for calls to each other's FX customers. This fact becomes readily apparent when the transport burdens imposed upon an ILEC when its customer calls a CLEC's FX customer is compared with the

burden imposed upon a CLEC when its customer calls an ILEC's FX customer, as the following diagram illustrates:



When viewed together, these diagrams illustrate that an ILEC's costs are not affected by the location at which a CLEC delivers traffic to its customers, a CLEC's costs are not affected by the location at which an ILEC delivers traffic to its customers, and CLECs and ILECs incur the same costs to provide originating service to their customers when they call numbers from virtual NXX codes as they incur when their customers call numbers from any other NXX code.[83]

[83] AT&T Comments at 61; Allegiance Comments at 53.

The diagrams also illustrate that Verizon's allegations of ''theft of service" are much ado about nothing. If CLECs steal service from ILECs by providing FX services, then ILECs likewise are stealing services from CLECs by providing FX services. In reality, however, neither ILECs nor CLECs are stealing services from each other by providing FX services, because FX traffic is indistinguishable from all other traffic. Transport burdens are determined by the location of a carrier's own customer and the POI with the interconnection carrier, not the service configuration that the other carrier uses to provide service. Although CLEC FX services may affect an ILEC's revenue, the impact is a competitive loss. However, a CLEC's revenue is equally affected whenever one of its customers calls an ILEC's FX customer. The ILECs merely want to recover lost toll revenues from their competitors rather than from their customers.[84]

In any event, the Commission should not permit the ILECs to escape the consequences of their choice not to compete in terms of price by allowing them to refuse to compensate CLECs for termination services that the CLECs have provided to the ILECs' customers. Nor should the Commission prevent CLECs from introducing new and innovative services by requiring competitors to mimic the ILEC's network and install equipment in every rate center regardless whether this equipment is necessary to provide the services that the CLEC offers.

2. *ILECS AND CLECS ASSIGN NUMBERS TO FX SERVICE CUSTOMERS IN EXACTLY THE SAME WAY*

Whenever a carrier – whether ILEC or CLEC – provides an FX-type service, it assigns a number to a customer who is not physically located within the rate center with which the number is associated. In fact, the service would not be an FX-type service at all if the carrier

[84] **Allegiance** Comments *at* 59-60.

assigned the customer a number associated with the rate center in which the customer is physically located.

Nothing in the rules and policies of the Commission or any of the state PUCs prohibits carriers from assigning a number to a customer who is not physically located within the rate center with which the number is associated. The Commission has recognized the legality of FX services,[85] and most – if not all – states have approved tariffs for FX services.[86] Accordingly, the Commission and most state PUCs recognize that carriers have the legal right to assign a number to a customer whether or not that customer is physically located within the rate center with which the number is associated, because this number assignment practice is the essence of all forms of FX service.

Similarly, nothing in the industry guidelines prohibits a carrier from assigning a number to a customer who is not physically located within the rate center with which the number is associated. This is not surprising given that the guidelines are adopted on the basis of industry consensus and carriers from nearly every industry segment, including wireline (both ILEC and CLEC) and wireless service providers, assign numbers to customers who are not physically located within the rate centers with which the numbers are associated.[87] Therefore, the practice of assigning a number to a customer who is not physically located within the rate center within which the number is associated is a valid use of numbering resources. This conclusion cannot be

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85 *See, e.g.,* AT&T Corp. v. Bell Atlantic – Pennsylvania, 14 FCC Rcd 446, ¶ 71 (1998) (recognizing legality of FX services).

86 *See, e.g.,* GTE Florida Inc. General Services Tariff, effective February 10, 1992 at Section A9; GTE Southwest Inc. Texas General Exchange Tariff, effective February 23, 1989, at Section 19; WorldCom Technologies Inc., TX P.S.C. No. 2, effective May 21, 1999, at Section 9.

87 In any event, industry guidelines do not supersede applicable federal or state rules and policies. *See* Central Office Code (NXX) Assignment Guidelines, INC 95-0407-008 (reissued September 21, 2001), at § 1.0.

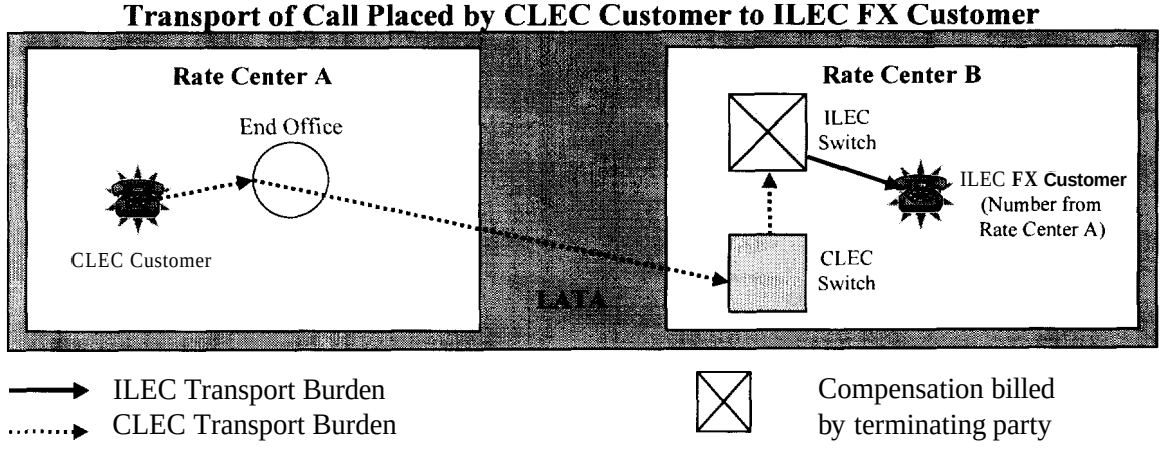
disputed by carriers that provide FX services, including wireless carriers, which frequently assign numbers to customers who are not physically located within the rate center within which the number is associated.

Because it is a valid use of numbering resources to assign a single number to a customer who is not physically located within the rate center with which the number is associated, it is an equally valid use of numbering resources to assign an entire block of numbering resources – whether a full NXX or a thousands-block where number pooling has been implemented – in the same way. The validity of any given number assignment practice does not depend upon whether it involves only a portion of the numbers in an NXX code or the entire NXX code: the use of the numbering resource is either valid for every number within an NXX code or invalid under all circumstances. Moreover, nothing in the rules and policies of the Commission or the industry guidelines dictates the type of service that a carrier must provide (*e.g.*, non-FX services), or requires a carrier to offer multiple types of service, in order to obtain and use numbering resources (*e.g.*, FX and non-FX services).

As a provider of FX services. Verizon cannot dispute the legality of assigning a number to a customer who is not physically located within the rate center with which the number is associated. Nonetheless, Verizon argues that it is an "abuse of the number resources scheme" for carriers to use numbers to provide FX services in areas where they do not also provide non-FX services.[88] Verizon's argument should be recognized for what it is: An attempt by Verizon to protect its revenue stream for FX services by exploiting its ubiquity.

[88] BellSouth Comments at 7-8; **USTA** Comments at 33; Verizon Comments at **8-9.**

Verizon attempts to distinguish its FX services from those offered by its competitors by claiming that Verizon "actually has facilities and customers in the exchange area for which it has received telephone numbers."[89] However, this is a distinction without a difference. With respect to calls from one carrier's customers to another carrier's FX customer, whether the carrier providing FX service has facilities or customers in the rate center with which the number is associated is irrelevant because the facilities used to provide the FX service are located in the rate center where the FX customer is physically located, as the following diagram illustrates:



Although the ILEC in the diagram has customers and facilities in Rate Center **A,** these customers and facilities are not used to provide, and are not affected by, the ILEC's FX service when the originating caller is a CLEC customer.[90] The ILEC could provide the same FX service if it had

89 **USTA** Comments at 32; Verizon Comments at 7-8; Verizon Wireless Comments at 32-33.

90 Of course, the ILEC's customers and facilities in Rate Center **A** will be directly affected if an ILEC customer in that rate center originates a call to an FX number associated with Rate Center **A.** However, the way in which a carrier chooses to allocate costs for the transport of traffic between its own customers has no bearing on the validity of a numbering assignment practice.

no customers or facilities in Rate Center A, and the existence of those customers and facilities has no impact whatsoever on the efficiency with which the ILEC uses that number to provide FX services to its customer. In this sense, Verizon's FX services are exactly like the FX services that any other carrier provides, and it is irrelevant whether a carrier has customers or facilities within the rate center with which the number is associated.

Verizon also claims that its FX service, unlike the FX services of other carriers, does not waste numbering resources.[91] Again, Verizon is attempting to hide behind its ubiquitous presence and incumbent status to mask the fact that Verizon's FX service has the same impact on numbering resources as any FX service offered by another carrier. Specifically, Verizon typically assigns to a single FX customer multiple numbers, none of which are associated with the rate center in which the FX customer is physically located. Thus, Verizon cannot in good faith claim that the assignment of multiple numbers to a single customer is a waste of numbering resources. Instead, Verizon must be complaining about the fact that when a new market entrant applies for a block of numbering resources – whether a full NXX or a thousands-block where number pooling has been implemented – in order to provide an FX service, the remaining numbers within that block are not immediately used. Of course, Verizon, as the incumbent, does not need to apply for numbering resources in order to provide an FX service because it can assign any of the millions of numbers that it already has. However, new market entrants are forced by the current numbering administration system to apply for an entire block of numbering resources – whether a full NXX or a thousands-block where number pooling has been implemented – in order to provide service to a single customer, regardless the type of

[91] **USTA** Comments at 33-34; Verizon Comments at 8.

service the carrier is providing. As such, FX-type services are no more inefficient than other types of services. Therefore, Verizon's allegation that virtual NXX arrangements "waste" numbering resources is untrue.[92]

Verizon in essence is urging the Commission to bar carriers from entering Verizon's markets in the name of number conservation. Indeed, from a numbering perspective, it makes no difference whether the new market entrant intends to provide traditional voice services or FX-type service: the carrier entering the market is forced to obtain a full block of numbering resources – whether a full NXX or a thousands-block where number pooling has been implemented – in order to serve a single customer. The solution to this problem is not to bar new market entrants, which would conserve numbering resources by sacrificing the competition that the 1996 Act seeks to foster, but rather to reform the way in which numbers are administered.

The Commission has already adopted number pooling in order to reduce the amount of numbers that new market entrants are forced to acquire in order to provide service. The Commission is also examining additional measures to improve the efficiency with which carriers utilize numbering resources in CC Docket No. 99-200. These measures are interrelated, and the implementation of one measure may have a detrimental effect on other measures. Consequently, it would not be wise to discuss the potential effects on numbering utilization of one specific issue in an unrelated docket on intercarrier compensation. Therefore, KMC and e.spire urge the Commission to consider the potential effects that the use of virtual NXX codes may have on numbering utilization in CC Docket No. 99-200, *Numbering Resource Optimization,* rather than this proceeding on intercarrier compensation.

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[92] BellSouth Comments at **7-8;** Verizon Comments at 4, **8-9.**

In any event, the Commission should not prohibit new market entrants from providing a service that ILECs have offered for decades based on the misguided belief that it will optimize the utilization of numbering resources. This prohibition would not only discriminate against competitive carriers and destroy the competition that the 1996 Act seeks to create, but also lead to more inefficient numbering utilization.[93]

3. *FX SERVICES PROVIDED WITH VIRTUAL NXX ARRANGEMENTS CREATE THE SAME INCENTIVES FOR INFRASTRUCTURE INVESTMENT AS THE FX SERVICES THAT ILECS OFFER*

Verizon claims that virtual NXX arrangements create disincentives for LECs to build their own facilities.[94] Nothing could be further from the truth. The use of virtual NXX arrangements has no effect on the incentives of LECs to build their own facilities. Regardless whether or not the facilities used to provide a given service are located within the rate center with which the number is associated, the ILEC is responsible for traffic on its side of the POI, and the CLEC is responsible for traffic on the other side of the POI. Each LEC has incentives to reduce the costs of providing service on its respective side of the POI, and each LEC has to compensate the other LEC for terminating traffic on its behalf. Prohibiting virtual NXX codes will have no effect on these incentives.

B. CARRIERS THAT ONLY PROVIDE FX-TYPE SERVICES HAVE AN EQUAL RIGHT TO OBTAIN INITIAL NUMBERING RESOURCES UNDER THE COMMISSION'S RULES AND INDUSTRY NXX ASSIGNMENT GUIDELINES AS THE ILECS

In its comments, Verizon claims that a carrier which only offers FX-type services cannot satisfy the Commission's requirements for obtaining initial numbering resources.

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93 CompTel Comments at **28;** KMC Comments at 2, 9-10.

94 Verizon Comments at **6.**

Specifically, Verizon accuses these carriers of violating Section 52.15(g)(2) of the Commission's regulations[95] as well as Sections 3.1 and 4.1 of the industry's NXX Assignment Guidelines.[96] Verizon's accusation is incorrect.

Section 52.15(g)(2) of the Commission's rules allows a LEC to obtain telephone numbers if "the applicant is authorized to provide service in the area for which the numbering resources are being requested" and "the applicant is or will be capable of providing service within sixty (60) days of the numbering resources activation date."[97] As Verizon correctly notes, the LEC must support its application with "documented proof' of these facts, providing the NANPA with

> appropriate evidence (*e.g.*, contracts for unbundled network elements, network information showing that equipment has been purchased and is operational or will be operational, business plans, or interconnection agreements) that its facilities are in place or will be in place to provide service within 60 days of the numbering resources activation date.[98]

Verizon claims that this requirement can be met only if the LEC has installed facilities within the rate center with which the numbers will be associated. However, the Commission's rules only require a carrier to demonstrate that it already has – or soon will have – the necessary authorization and facilities to provide the proposed service using the numbers for which the carrier is applying.

With respect to FX services, the relevant inquiry under Section 52.15(g)(2) of the Commission's rules is whether the carrier has facilities within the "foreign rate center," not

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95 *Id.* at **8.**

96 *Id.* at **9.**

97 47 C.F.R. § 52.15(g)(2).

98 *Numbering Resource Optimization,* 15 FCC Rcd 7574 **at** ¶¶ 96-97.

whether the carrier has facilities in the rate center with which the numbers will be associated, because these are the only facilities necessary to provide the intended FX service.[99] Accordingly, new market entrants that intend to provide only FX services must provide the NANPA with evidence that the entrant (1) is authorized by the relevant state PUC to provide the FX services it intends to provide; and (2) has in place – or will have in place within 60 days – the facilities in the "foreign" rate center that are necessary to provide the proposed FX service (*e.g.*, contracts for unbundled network elements, network information showing that equipment has been purchased and is operational or will be operational, business plans, or interconnection agreements). However, the carrier need not demonstrate that it has facilities within the rate center with which the numbers will be associated because these facilities are not necessary to provide the intended FX service.

Similarly, nothing in the industry guidelines requires a carrier that only provides FX services to demonstrate that it has facilities within the rate center with which the numbers will be associated. Verizon bases its claim to the contrary on the statements in the industry guideline that (1) "for assignment and routing purposes, the CO code (NXX) is normally associated with a specific geographic location within an NPA, from which it is assigned""'; (2) NXXs are assigned "to the extent required to terminate PSTN traffic"[101]; and **(3)** NXXs "are assigned to entities for use at a Switching Entity or Point of Interconnection they own or

99 If in addition to FX service the carrier provides voice origination to any customers within the rate center with which the numbers will be associated, the carrier obviously must have facilities within that rate center so that calls from the carrier's voice origination customer can be handled.

100 *Guidelines* at § 1.0.

101 *Id.* at § 4.1.

control."[102] However, none of these statements support Verizon's argument. First, NXXs assigned to carriers that only provide FX services are "associated with a specific geographic location within an NPA," because they are associated with a single geographic rate center in the LERG exactly like every other NXX. Second, NXXs assigned to carriers that only provide FX services are assigned "to the extent required to terminate PSTN traffic," because they are necessary to terminate PSTN traffic to the carrier's FX customer. Third, NXXs assigned to carriers that only provide FX services "are assigned to entities for use at a Switching Entity or Point of Interconnection they own or control," because they are used by the carrier at its switching entity or POI in the "foreign" exchange.

Section 4.2.2 of the Industry Guidelines, entitled "facilities readiness," confirms the conclusion that a carrier which only provides FX services is entitled to obtain initial numbering resources even if the facilities it uses to provide the services are not physically located within the same rate center with which the numbers will be associated. Pursuant to Section 4.2.2., an applicant can demonstrate "facilities readiness" by providing any one of seven types of evidence. Six of these types of evidence do not mention the physical location of the facilities, and one explicitly recognizes that carriers can provide services using facilities located in a rate center other than the one with which the numbers will be associated. Specifically, the guidelines provide that a carrier can demonstrate "facilities readiness" by providing "a letter from the requesting carrier identifying a code in service in another rate center that already uses the same facilities that will be used to serve the new rate center where the initial code is being requested." Accordingly, a carrier can obtain **a** code by demonstrating that it will use facilities

[102] *Id.* at § 3.1.

located in another rate center to serve the new rate center where the initial code is being requested.

In sum, so long as a LEC has obtained the requisite authorization from the relevant state PUC(s) and/or the FCC to provide the service at issue, the LEC has a right to assign numbers to customers as necessary to provide that service. Accordingly, if a LEC has the requisite authority to provide FX services, it has the right to obtain numbering resources from the North American Numbering Plan Administrator ("NANPA") and assign numbers to FX customers (which by definition are not physically located within the rate center with which the numbers are associated) whether or not the LEC provides any other type of service. Therefore, Verizon's claim that virtual NXX arrangements "violate existing Commission regulations and industry numbering guidelines"[103] is untrue.

V. THE ACT PROVIDES NO BASIS FOR TREATING TRAFFIC DIFFERENTLY BASED SOLELY ON WHETHER IT IS ROUTED TO A VIRTUAL NXX OR ANY OTHER NXX CODE FOR THE PURPOSES OF INTERCARRIER COMPENSATION.

KMC and e.spire agree with other commenting parties, including Allegiance and Cablevision Lightpath, that the 1996 Act does not classify traffic on the basis of whether it is routed to a telephone number from a virtual NXX code or any other NXX code.[104] Specifically, traffic that meets the definition of "telecommunications traffic" and is subject to reciprocal compensation pursuant to Section 251(b)(5)[105] remains telecommunications traffic whether it is routed to a telephone number from a virtual NXX code or any other type of NXX code. This is

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103 Verizon Comments at 8-9.

104 Allegiance Comments at 53-54; AT&T Comments at 60-61; Cbeyond Comments at 12; Comments of Cablevision Lightpath at 6-7.

105 47 **U.S.C.** § 251(b)(5).

consistent with the way that ILECs have traditionally classified this traffic. For example, until February 2001, BellSouth treated calls to its FX customers as local and billed CLECs reciprocal compensation.[106] Verizon continues to bill CLECs reciprocal compensation for calls to its FX numbers, and in a proceeding before the Florida Public Service Commission proposed to continue billing CLECs for reciprocal compensation while arguing that CLECs may not.[107] Consequently, where the statute mandates that traffic be subject to reciprocal compensation pursuant to Section 251(b)(5), then the type of NXX code – or any other NANPA numbering resource for that matter – to which the traffic is routed is irrelevant.

CONCLUSION

For the foregoing reasons, e.spire and KMC urge the Commission to reject proposals to impose a mandatory or default bill-and-keep regime on intercarrier compensation or to limit the provision of FX-type services through the use of virtual NXX codes.

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Dated: November 5,2001

106 Allegiance Comments at 56.

107 *Id.* at 56.

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